IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 391 OF 2003.

Shri Pandurang alias Shashi Dessai,
son of Krishna Dessai,
aged 61, retired serviceman,
resident of H.No. 304,
Gauthan, veroda, Cuncolim,
Salcete, Goa. .... Petitioner.

Versus

Kum. Beraldin Tavaeres,
daughter of late Egidio Tavares,
major of age, spinster, housewife,
resident of H. No. 1724,
Sanvorcotto, Cuncolim,
Salcete, Goa. .... Respondent.

Mr. Sudesh usgaonkar, Advocate for the Petitioner.

Mr. Valmiki Menezes, Advocate for the Respondent.

CORAM: DR. S. RADHAKRISHNAN, J.

Date of Reserving the Judgment: 12.10.2006.
Date of Pronouncement of Judgment: 20.10.2006.

J U D G M E N T:

1. By this petition the petitioner/defendant is challenging the Judgment and Order dated 30th June, 2003 passed by the learned Civil Judge, Junior Division, Margao declining to grant the application filed by the petitioner seeking extension of time to file the written statement in the

pending Civil Suit.

2. The learned counsel for the petitioner-defendant, Mr. Usgaonkar contended that now the law is well settled that under Order VIII Rule 1 of the Code of Civil Procedure, the provision contemplating that the written statement should be filed normally within 30 days and in any event the time can be extended only upto 90 days and thereafter in a given case the court can even grant time beyond the aforesaid period of 90 days.

3. The learned counsel for the petitioner-defendant submitted that in the instant case the defendant had not adopted any dilatory tactics and he had filed the reply to the interlocutory proceedings within seven days of being served with the proceedings. He submitted that the reply filed in the interlocutory proceedings is almost similar to the written statement. Mr. Usgaoncar also contended that the respondent herein had filed an application for tendering additional documents and thereafter the petitioner-defendant had filed an application for appointment of a Commissioner. Both these applications were disposed of. An amendment application was made by the respondent-plaintiff. Mr. Usgaoncar pointed out that the petitioner was served with the copy of the written summons on 10th December, 2003 and as such the petitioner-defendant ought to have filed the Written Statement within 30 days as per Order VIII rule 1 Code of

Civil Procedure i.e. on or before 9th January, 2003. He contended that there were negotiations between the parties to settle the matter and that the earlier Advocate for the plaintiff-respondent took a discharge and another Advocate was appointed and also in view of the aforementioned applications by the plaintiff and defendant were being taken, the plaintiff could not file the written statement within 30 days and also within the period of 90 days as provided under Order VIII Rule 1 Code of Civil Procedure. The written statement was sought to be tendered on 28th April, 2003 which was opposed to by the Advocate for the plaintiff and ultimately the Court, by the impugned order, found no ground made out to condone the delay and rejected the said application .

4. Mr. Usgaoncar in that behalf strongly relied on the judgment of the Supreme Court in ***Shaikh Salim Haji Abdul Khayumsab v. Kumar & Ors. (2005 AIR SCW 6031)*** wherein the Supreme Court has clearly held that the provision providing for maximum period of 90 days under Order VIII, Rule 1 is not mandatory and that the court is not altogether powerless to extend the time even in an exceptionally hard case. In the aforesaid judgment, various other Supreme Court judgments have been referred to emphasise that the said provision is only a procedural law and the same should not be construed in a mandatory form to deny justice and even though limit of 90 days is prescribed, still the Court is not

powerless to condone the delay beyond 90 days.

5. The learned counsel appearing on behalf of the respondent-plaintiff contended that the plaintiff had filed a reply to the application for enlargement of time filed by the petitioner-defendant strongly disputing that there was no negotiation for settlement at all in the above case and the learned counsel Mr. Menezes pointed out that in the above case the petitioner ought to have filed the written statement within thirty days i.e. on or before 9th January, 2003. He contended that subsequent to 9th January, 2003 the matter had come up on various occasions before the trial Court i.e. on 18th January, 2003, 6th February, 2003, 27th February, 2003, 20th March, 2003, 27th March, 2003, 17th April, 2003 and only on 28th April, 2003 the petitioner-defendant had sought to tender the written statement to which the respondent-plaintiff had strongly objected. Mr. Menezes contended that in the instant case the petitioner-plaintiff has not been able to point out any genuine reason whereby the petitioner-defendant was precluded or prevented from filing a written statement even beyond the said period of ninety days or even upto the period of ninety days.

6. In that behalf Mr. Menezes strongly relied on the well known judgment of the Supreme Court laying down the scope of Order VIII Rule 1 C.P.C. in ***Kailash v. Nanhku and others (2005) 4 SCC 480*** wherein after

analysing various provisions and case laws, the Supreme Court has come to the following conclusions with regard to Order VII Rule 1 of C.P.C. in paragraph 46 of the said judgment :-

> " 46. .....
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> (iv)The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.
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> (v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to

> be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the ground pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case. ”

7. Relying on the above, Mr. Menezes, contended that though Order VIII Rule 1 of C.P.C. is a part of procedural law and hence it was construed to be directory. The Supreme Court has clearly held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of an exception. He also emphasized the prayer for extension of time made by the defendant shall not be granted

just as a matter of routine and merely for the asking, more so when the period of ninety days has expired. He emphasized that extension of time may be allowed by way of an exception for reasons to be assigned by the defendant and also be placed on record in writing for the court to be satisfied. To put it in other words, he emphasized that after the expiry of ninety days the court has the power in a given case to condone the delay under exceptional circumstances and grounds ought to be made out and in the instant case Mr. Menezes pointed out that right from 9th January onwards till 28th April, 2003 on a number of occasions the matter was on board, however, the petitioner-defendant made no attempt to seek extension or even tender the written statement.

8. Mr. Menezes also relied on another Judgment of the Supreme Court in ***Smt. Rani Kusum v. Smt. Kanchan Devi and others (AIR 2005 SC 3304)*** *wherein paragraph 10* reads as under :-

> " 10. Order VII, Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the

> provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried. "

9. The learned counsel referring to the above, submitted that the defendant is not assisting in expeditious disposal of the above suit and has been causing inconvenience to the plaintiff by adopting dilatory tactics of filing application for Court Commissioner, etc. and also not filing any written statement in time. Finally Mr. Menezes also referred to a judgment of the learned Single Judge of our Court in ***Shailaja A. Sawant (DR.) v. Sayajirao Ganpatrao Patil [2004 (2) Mh.L.J. 419]*** specially paragraph 31 which reads as under :-

> " 31. The above reasoning does not mean that the order extending time to file reply may be passed repeatedly unmindful of and totally ignoring the provisions that the extension may not exceed 90 days. It has to be done keeping in view the recent amendment and the Statement of Objects and Reasons. The discretion that is conferred on

the trial Court under Rule 9 and Rule 10 of Order 8 of the Civil Procedure Code, as also Rule 1 cannot be exercised arbitrarily. The Supreme Court in *Topline Shoes Ltd.* has sounded a word of caution. The provisions of Rule 1 and the Statement of Objects and Reasons must be kept in mind while passing an order extending the time to file a written statement. The powers under Rules 1, 9 and 10 of Order 8 should be used only in exceptional cases and that too for for the reasons to be recorded in writing and cannot be exercised by a defendant as a matter of right. Such exercise of discretion must be judicial and not capricious and in keeping with the spirit of the recent amendment. In my opinion, there could be a variety of situations where the Court may have to exercise the power vested in it, such as circumstance or events beyond the control of the defendant. For instance, an illness whether natural or accidental which does not permit the defendant to move from the bed for a long time and such illness is proved by the defendant, or negligence or carelessness of the advocate inviting the complaint for disciplinary action. However, as to the circumstances in which the discretion vested in the Court should be exercised no hard and fast rule can be laid down. It all depends on the particular facts of each case. The reasons recorded should reflect the circumstances in which the discretion vested is exercised. An endeavour should be to avoid 'snap decision'. The grounds, such as the advocate was not available, ignorance of law, the relevant documents were not available or any such ground, which could be termed as frivolous, cannot be a ground for the Court to exercise powers vested in it under the provisions of Rules 1, 9 and 10 of Order 8 for extending time for filing a written statement beyond the period prescribed under Rule 1 of Order 8, Civil Procedure Code. ”

10. Relying on the above, Mr. Menezes contended that in the instant case, he is not questioning the power of the Court to condone delay. However, in the instant case the petitioner-defendant has not made out any case of being prevented or precluded from filing the written statement for certain genuine reasons. Under the circumstances, he submitted that the trial Court had not committed any error in rejecting the application for condoning the delay in filing the written statement.

11. After hearing both the sides and on perusal of the Supreme Court judgments and the learned Single Judge's judgment of our Court and after perusal of the roznama, it is clear that in the instant case the petitioner-defendant had at least seven occasions wherein he could have very well filed the written statement or sought time to file the written statement, that too it was beyond the prescribed period of 30 days which expired on 9th January, 2003. Thereafter from 9th January, 2003 till 28th April,, 2003 there were at least seven occasions when the petitioner could have very well filed or sought time to file the Written Statement. The petitioner had even allowed 90 days to expire and thereafter tendered the written statement on 28th April, 2003 when objected to by the plaintiff and thereafter seems to have preferred an application and filed on the very same day i.e. 28.4.03 seeking extension of time in writing. The grounds

set out in the application mainly are various proceedings were adopted by the plaintiff as well as the defendant and also that the plaintiff and defendant were trying to settle the dispute which fact has been categorically denied by the respondent-plaintiff. As far as taking out various proceedings are concerned, the same has no relevance as far as filing of the written statement is concerned. Now the provisions of Order VIII Rule 1 of C.P.C. very specifically states that written statement generally should be filed within 30 days and if it is not filed within 30 days, the Court may permit upto 90 days i.e. a further period of two months are given. In the instant case the petitioner-defendant seems have made no effort whatsoever during the entire period of 90 days and suddenly has woken up after the expiry of 90 days with this application. Even the said period of 90 days expired on 11th March, 2003 and the attempt to tender the Written Statement was made only on 28th April, 2003, i.e. a further period of about 45 days.

12. In view of the settled position of law as laid down by the Supreme Court in the case of ***Kailash v. Nanhku and others (2005) 4 SCC 480*** specially in paragraph 46(v), filing of written statement within the prescribed time should be a rule and the departure would be only by way of an exception and the same cannot be granted as a matter of routine merely for the asking specially when the period of 90 days had expired.

In the instant case, I am not satisfied with the reasons given by the Petitioner-Defendant, to exercise the discretion in favour of the Defendant.

13. Under these circumstances, I do not find any case made out or any error apparent on the face of the record to interfere in the above. Hence the Rule stands discharged, however with no order as to costs.

DR. S. RADHAKRISHNAN, J.

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